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No. 152

In the Supreme Court of the United States

OCTOBER TERM, 1961

LUCAS COUNTY FARM BUREAU COOPERATIVE ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LEE E. MODJESKA,
Attorney,
National Labor Relations Board,
Washington 25, D.C.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–3a) is not yet reported. The decision and order of the National Labor Relations Board (R. 97a–130a)[1] are reported at 128 NLRB No. 56. The Board's representation determination, which forms the basis for that decision and order, is set forth at R. 15a–17a.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1961 (Pet. 4a). The petition for a writ

[1] "R." refers to the Joint Appendix filed with the court below.

of certiorari was filed on June 16, 1961. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the petitioner, a farmers' cooperative association, was engaged in commerce within the meaning of the National Labor Relations Act, and that its employees were not agricultural laborers excluded from the Act's coverage.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pages 2–5 of the petition.

STATEMENT

1. *The business of the petitioner.*—The petitioner, a farmers' cooperative association, is engaged in Ohio in the marketing of grain and the processing of seed and feed for its members (R. 15a, 99a; 48a–49a, 51a, 70a). It also sells at retail to its members and to the public certain farm supplies such as feed, seed, fertilizer, and spray materials (R. 15a, 99a; 51a, 59a, 69a–70a). During the fiscal year 1958, the petitioner's retail supply sales totaled $982,127 (R. 51a, 73a). In connection with these sales, the petitioner purchased at least $34,500 worth of goods from outside Ohio (R. 15a, 99a; 57a, 58a–59a). During the same fiscal year, the petitioner sold $255,120 worth of grain (R. 51a), $187,000 of which was sold to a grain marketing cooperative outside Ohio, of which the petitioner was, in turn, a member (R. 54a, 60a–61a, 63a, 73a). Of the $187,000 representing grain sales to the parent cooperative, $35,000 to $40,000 worth consisted

of grain delivered by the petitioner itself to the parent cooperative and the remainder represented grain delivered by the farmers who were compensated by the petitioner after it, in turn, was paid by the parent cooperative (R. 52a–53a, 54a–55a, 61a–64a). The farmers could not sell directly to the petitioner's parent cooperative but were required to go through one of the member elevators (R. 55a). The petitioner has 22 employees, including truckdrivers, warehousemen and yardmen (R. 105a; 41a, 49a). It is conceded that the petitioner, as distinguished from its members, does not engage in any farming operations (R. 65a).

2. *The representation proceeding.*—On January 21, 1959, Local 58, American Federation of Grain Millers, AFL–CIO ("the Union"), filed a petition for certification pursuant to Section 9(c) of the National Labor Relations Act (R. 103a; 11a–14a, 76a). Thereafter, a representation hearing was held in which the petitioner contested the Board's jurisdiction over its operations. On April 7, 1959, the Board issued its "Decision and Direction of Election" in which it found that the petitioner was engaged in commerce within the meaning of the Act, that the volume of the petitioner's retail business met the Board's standard for the assertion of jurisdiction over retail enterprises, and that it would effectuate the purposes of the Act to assert jurisdiction over the petitioner (R. 103a–104a; 15a–17a). The Board directed an election in a unit which it found to be appropriate, consisting of the petitioner's truckdrivers, yardmen, warehousemen, mill grain department employees and

plant clerks in all three of its plants (R. 105a; 16a–17a). The election, conducted by mail between April 27 and May 7, 1959, was won by the Union by a vote of 11 to 3 (R. 105a; 17a–18a, 20a). Thereafter, on June 22, 1959, after due consideration of the petitioner's objections to the election (R. 106a–107a; 19a–20a, 21a–22a, 24a–26a, 28a–32a), the Board certified the Union as the majority representative of the petitioner's employees in the bargaining unit (R. 106a; 28a).

3. *The unfair labor practice proceeding.*—Following the Board's certification, the Union at various times requested the petitioner to negotiate a contract (R. 109a–114a; 32a–34a, 36a, 43a, 80a–81a, 95a–96a). The petitioner admittedly refused to meet and bargain with the Union (R. 110a–111a, 114a, 125a, 128a; 43a, 95a–96a).[2] In addition, the petitioner entered into individual contracts with two employees in the bargaining unit, changing the terms and conditions of their employment (including the basis of computing their compensation, and the sick leave and vacation benefits theretofore received by them), without prior consultation with the Union (R. 116a, 125a, 128a; 37a–40a, 84a–87a, 88a, 91a, 94a–95a).

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[2] In a letter to the Union dated September 3, 1959, the petitioner advised the Union that "the company is not disposed to meet and negotiate with you on any labor contract until the action we filed in the Federal District Court in July questioning the jurisdiction and procedures before the National Labor Relations Board has been disposed of" (R. 114a; 36a–37a). In the District Court action (Civil Action 8253, N.D. Ohio), the petitioner sought to enjoin the Board from conducting the unfair labor practice proceeding. On December 15, 1959, the district court dismissed the complaint for lack of jurisdiction (R. 108a; Pet. 11).

The Board found that the petitioner's refusal to negotiate and bargain with the Union, as well as its individual dealings with the employees, constituted a violation of Section 8(a)(5) and (1) of the Act (R. 125a, 128a). The Board also reaffirmed its prior determination in the representation proceeding that the petitioner's operations were subject to its jurisdiction (R. 99a, 124a). The Board ordered the petitioner to cease and desist from the unfair labor practices found, to bargain collectively with the Union upon request, and to post appropriate notices (R. 129a–130a).

4. *The decision of the court of appeals.*—The court of appeals held that the Board had statutory jurisdiction over the petitioner's operations, and that "the extent to which that jurisdiction will be exercised is a matter of administrative policy within the discretion of the Board" (Pet. 1a–3a). The court enforced the Board's unfair labor practice order.

ARGUMENT

The petitioner concedes that it has refused to recognize and bargain with the Union. Its sole defense to the Board's Section 8(a)(5) order is that the Board improperly asserted jurisdiction over its operations. The petitioner's contention is insubstantial and thus presents no question warranting review by this Court.

It is well settled that the Board's jurisdiction under the National Labor Relations Act reaches to the full extent of the power of Congress under the Commerce Clause. *Guss* v. *Utah Labor Board*, 353

U.S. 1, 3; *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 606–607. As shown above, during the fiscal year 1958, the petitioner purchased materials valued at about $34,500 from outside the State of Ohio and sold products valued at $187,000 outside that State. This volume of interstate commerce is clearly sufficient to give the Board jurisdiction over the petitioner's operations.[3]

Nor is a different conclusion required by the petitioner's contention (Pet. 13–22) that its employees are "agricultural laborers," exempt under Section 2(3) of the Act.[4] The employees in the unit for which the Union was certified, namely, truckdrivers, yardmen, warehousemen, mill grain department employees, and plant clericals, worked for the petitioner cooperative and not for its member farmers. None of the employees performed any work on a farm. Since the cooperative itself does no farming and is not engaged in farming activities (R. 65a), none of the employees may be said to have engaged in farming or work incidental thereto performed on a farm or by a farmer. The necessary requisite for "agricultural

[3] There is no merit to the petitioner's argument (Pet. 2, 22–24) that the court below sustained the Board's jurisdiction upon the basis of facts not found by the Board. Since the Board found that the petitioner's purchase of $34,500 worth of goods from outside Ohio was alone sufficient to confer jurisdiction (R. 15a), there was no need for the Board to note that the $187,000 outflow of goods would also have afforded a basis for jurisdiction. However, as this additional commerce data is found in the undisputed testimony of the petitioner's own manager and in the petitioner's stipulation as to the competency and accuracy of the data (R. 48a, 51a, 52a–53a, 57a–64a, 73a), the court could properly refer to it in sustaining the Board's ultimate conclusion.

[4] Section 2(3) of the Act provides that the term "employee" shall exclude "any individual employed as an agricultural

laborer" status is thus lacking here. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755; *National Labor Relations Board* v. *Central Oklahoma Milk Producers Association*, 285 F. 2d 495, 497 (C.A. 10).[5]

The petitioner's suggestion that Congress intended to exclude all enterprises within the "Agricultural Economy" (Pet. 15–16) from the coverage of the Act overlooks the fact that the statutory exemption is specifically limited to the "agricultural laborer," and, as shown above, the petitioner's employees do not fall within the meaning of that term. However, even if the petitioner's distinction between "agriculture"

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laborer." Since 1946, the annual appropriation acts for the Board have regularly carried a rider which provides that the term "agricultural laborer" in Section 2(3) shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act. This latter provision reads in pertinent part as follows:

"'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

[5] See also, *Puerto Rico Tobacco Marketing Coop. Assn.* v. *McComb*, 181 F. 2d 697, 700-701 (C.A. 1); *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, 267 F. 2d 286, 290 (C.A. 5); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. 2d 76, 79–81 (C.A. 9); *Walling* v. *McCracken County Peach Growers Assn.*, 50 F. Supp. 900, 904 (W.D. Ky.). These and the cases cited in the text also demonstrate that the Board's jurisdiction is not lost merely because the petitioner may be a non-profit organization, or its members are farmers.